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**Overcoming the Legal Iron Curtain:
Similarities and differences in the use of preliminary
references between new and old Member States**

by

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Abstract

This article analyses the determinants that lead national courts across EU countries to use the preliminary reference procedure, paying special attention to the differences and similarities in the use of this mechanism of judicial cooperation between the old and the new Member States incorporated in 2004 and 2007. The study presents original and comprehensive data on the use of preliminary references (1961-2011) in all 27 Member states. Besides confirming the impact of common factors already tested in the literature, this research additionally identifies some differences in the institutional dynamics influencing the use of preliminary references across older and newer Member States.

Key-words

Court of Justice of the European Union, CJEU, preliminary references, new and old Member States, CEE, legal and political institutions



1. Introduction

In the last couple of decades, the literature has developed diverse explanations to account for how national judges' preferences and national institutional structures encourage the legal integration of Europe by means of Article 267 TFEU (Alter, 1996, 1998, 2008; Burley and Mattli, 1993; Carrubba and Murrain, 2005; Mattli and Slaughter, 1998b, 1998a; Stone Sweet and Brunell, 1998; Stone Sweet, 2004; Weiler, 1994; Vink et al., 2009; Wind et al., 2009; Wind, 2010; Hurner and Voigt, 2012). Scholars tried to assess whether legal and political institutional factors can explain why the Court of Justice of the European Union (CJEU) received more preliminary rulings from some Member States of the EU than from others. Until recently, the interest in the study of preliminary references made by national courts from new Member States has been limited, with some exceptions (see Kühn, 2006; Sadurski, 2008; Hurner and Voigt, 2012), due to their only recent incorporation into the EU and, consequently, the poor involvement of their national courts in the preliminary reference procedure established by Article 267 TFEU (ex-Article 234 TEC).

Nevertheless, this situation has, since recently, changed as new Member States have started to cooperate with the CJEU, to the extent of equaling or even surpassing the number of references sent by old Member States' courts. From one year to another, in some of these Member States from Central and Eastern Europe (henceforth CEE) the number of references requested has doubled or tripled. But despite the increasing judicial cooperation between the CJEU and new members' courts, little is known so far about the impact of legal and political institutions on the use of the preliminary references procedure by CEE courts as compared to the older members. This raises new questions related to the judicial behavior of national courts of new Member States, such as: 1) to what extent may the trends in the use of preliminary references in new member states be explained by the same institutional factors accounting for its use in older ones (e.g. dualism, judicial review of legislation, years of membership, among others); and, what is more important, 2) is there any specific institutional effect characterizing the preliminary references procedure within CEE?



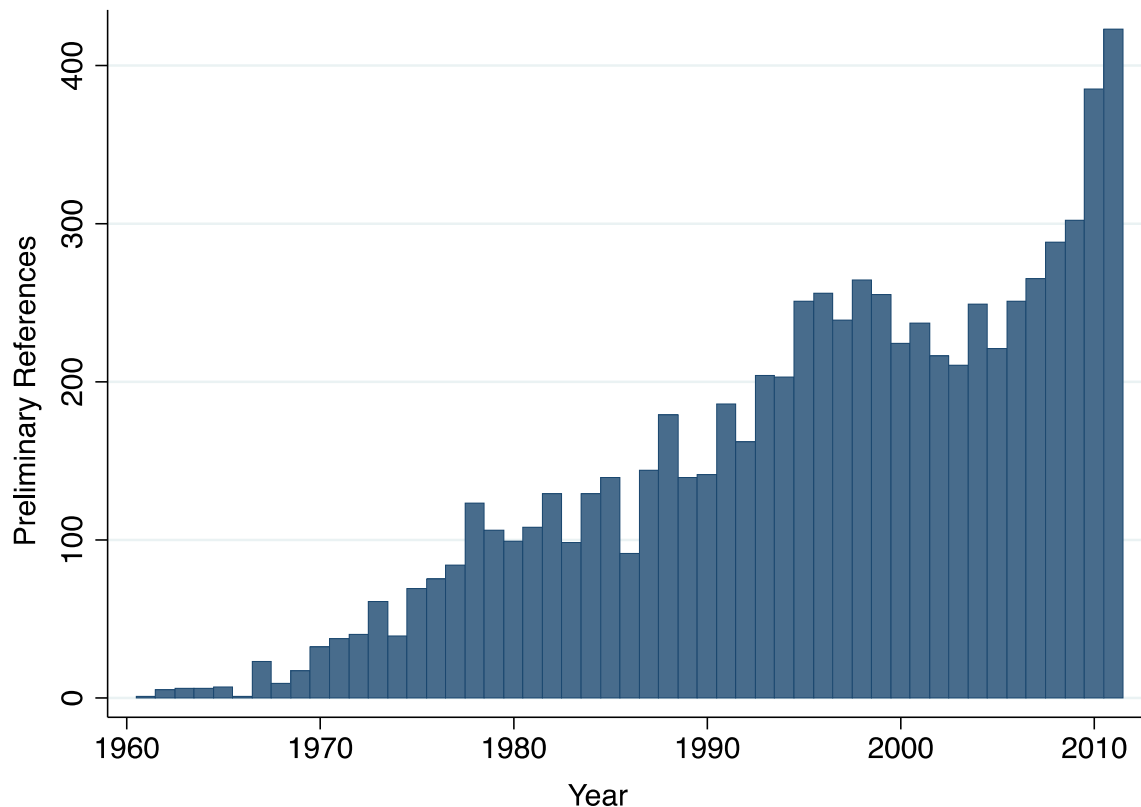
This article seeks to complement previous contributions on the institutional analysis of preliminary references by offering an assessment of the rationales for the involvement of national courts in newer Member States compared to older ones. This assessment will help to lift the “iron legal curtain” dulling our understanding of the use of preliminary references within newer Members States and shed some light on the common and similar factors driving the use of adjudication in both groups of Member States. For that purpose I will present comprehensive data on the use of preliminary references (1961-2011) in all 27 Member States (MS). The article is organized as follows: in the next section I briefly describe the historical pattern in the use of preliminary references in new and old Member States. The second section describes the main explanatory factors accounting for the use of preliminary references. The third section describes the research design and data used for the empirical analysis in section four, before the article ends in a conclusion.

2. A descriptive assessment of the use of preliminary references in older and newer Member States

The literature on European judicial politics has explained the increasing relevance of preliminary references (PR) and its variation across EU countries since 1961 (see Figure 1), considering temporal as well as country-related explanations.



Figure 1: Total amount of Preliminary References in the EC/EU by year (1961-2011)

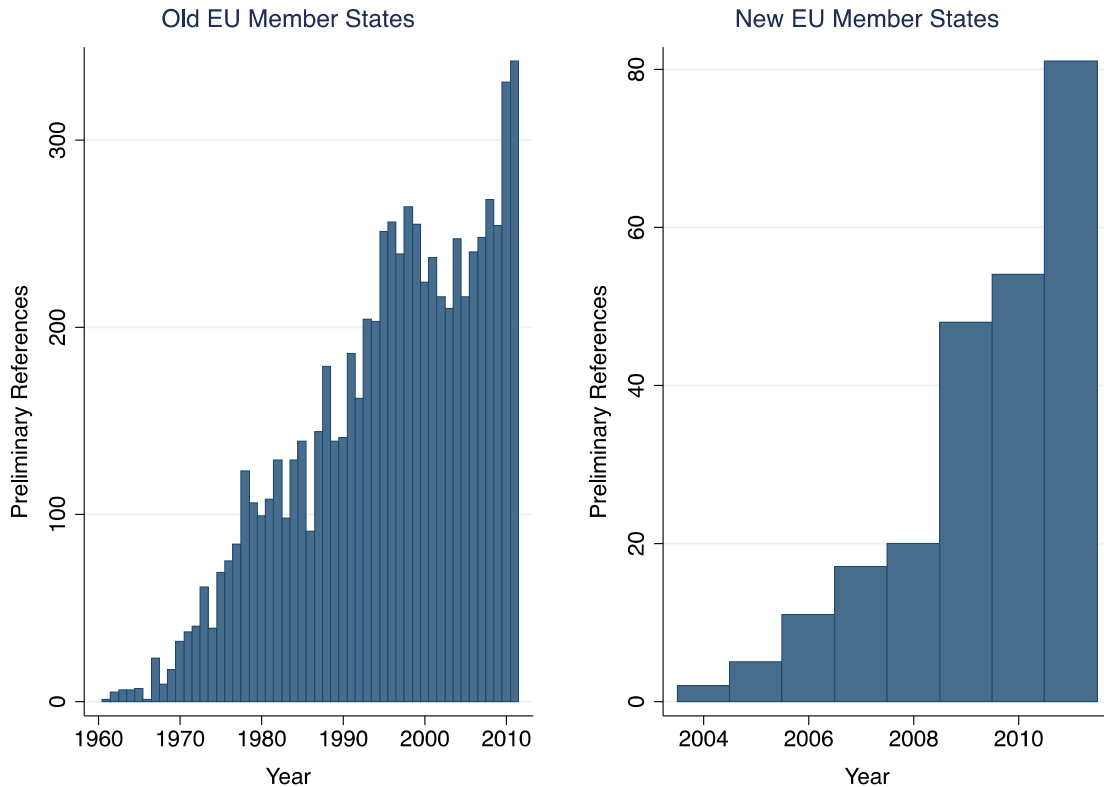


Source: CJEU statistics on judicial activity – http://curia.europa.eu/jcms/jcms/Jo2_7032/

As was said before, the inclusion of new Member States from CEE, as a separate group of analysis, has been missing due to their only recent integration and their poor involvement in the preliminary reference procedure. However, that situation has changed. Figure 2 confirms the increasing adaptation of national courts from CEE countries to the use of PR since their membership in 2004 and 2007, respectively, concluding that, as has happened also within the old MS, new member states are more likely to send more requests for preliminary references as the duration of their membership, and with it their experience with the EU legal system, increases.



Figure 2: Preliminary references by old and new EU member states (1961-2011)

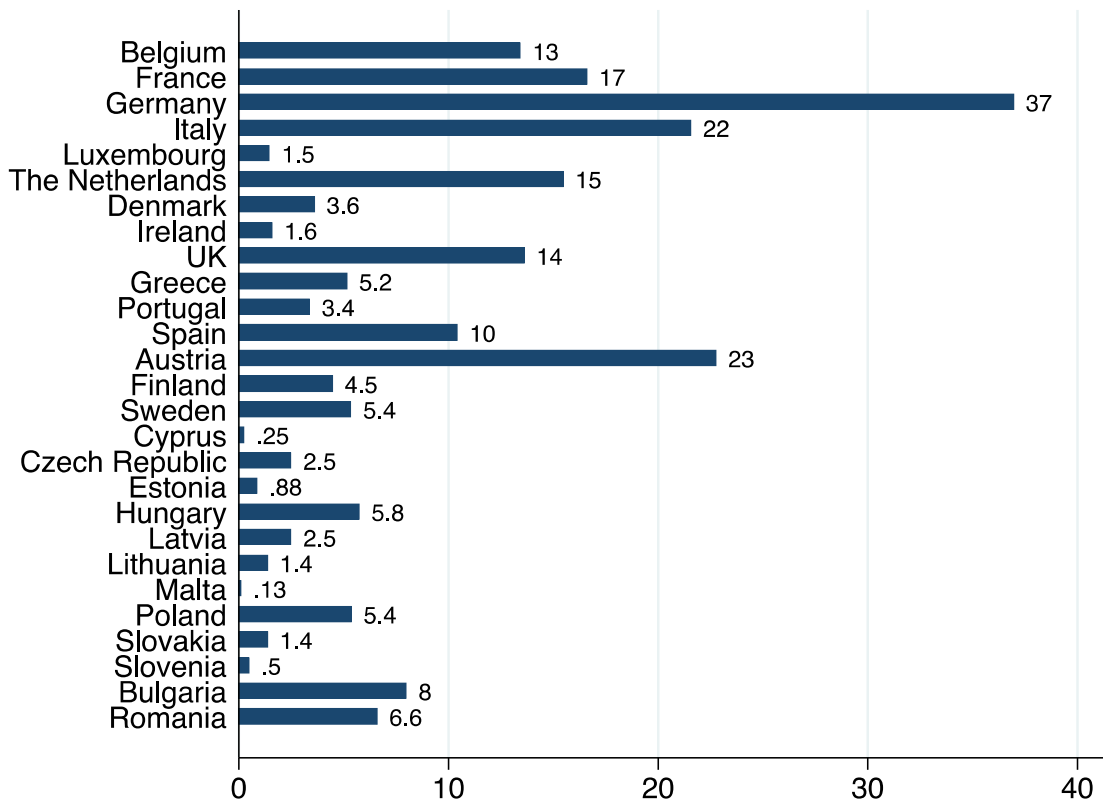


source: CJEU statistics on judicial activity – http://curia.europa.eu/jcms/jcms/Jo2_7032/

That situation becomes even more evident by looking at the differences in the use of preliminary references across countries through controlling for the number of years (see Figure 3). After controlling for temporal effects, we can better appreciate the large heterogeneity among the EU-27 countries and, what is more interesting, detect clear differences within the “new members” group. As regards the heterogeneity across EU-27 we see, for example, how countries like Romania and Bulgaria, after five years, of membership have doubled the number of references per year made by countries with more than 15 years of EU membership (e.g. Ireland, Sweden, Finland, among others). It is also important to emphasize the variation among CEE countries. For example, Member States that accessed the EU in 2004 perform differently as regards preliminary references, observing a variance that ranges from 0.25 for Cyprus to 5.8 for Hungary.



Figure 3: Preliminary references per years of membership (1961–2011)



Source: CJEU statistics on judicial activity – http://curia.europa.eu/jcms/jcms/Jo2_7032/

Therefore, this heterogeneity in the use of preliminary references demands an improvement of the institutional explanations when accounting for CEE countries. Despite the evident relevance of membership duration for the engagement of national courts in PR, we still need to know to what extent this variation in the use of preliminary references in new Member States is also a consequence of institutional factors. If so, we also need to know whether national courts from new Member States react to the same institutional incentives than the rest of the EU-15 when they request CJEU rulings. Hence, which factors may influence the use of preliminary references, according to the existing body of literature?



3. The institutional determinants of the use of preliminary references by national courts

In this section I will explain the legal and political factors offered in the literature to account for the use of preliminary references. Most of the variables presented here belong to previous explanations given by scholars devoted to EU judicial politics. However, this article will try to test also new hypotheses, such as *government capacity* and the *counter-limits doctrine*.

3.1 Openness of the domestic legal order: monism vs. dualism

Monism and dualism regarding EU law might be seen, rather, as symptoms of the different constitutional openness of a domestic legal order. Theoretically, dualist orders treat national and international law (including European law) as two separate sources of law, while monist systems integrate international legal orders into the national normative system with binding force (Hoffmeister, 2002; Ott, 2008). As a result, while *monist legal orders* integrate international and European legal systems as a part of national norms – implying the unconditional acknowledgment of EU law primacy – states with *dualist systems* emphasize the difference between national and international law and do not automatically accept European legal supremacy.

With regards to the effects of this differentiation on the preliminary references made by national courts, on one hand, several scholars argue that national courts in monist legal system are more willing to apply EU law, especially when they suspect EU law to contradict the principles of their national legal systems. As a result of their greater willingness and experience with international law and instruments, national courts from monist contexts will rely more often on supranational adjudication than courts in dualist systems (Alter, 1996; Hornuf and Voigt, 2012). Accordingly, we should expect national courts in dualist countries to be less willing to cooperate with supranational courts when they have to decide about the reception of EU law within their national legal system (Vink et al., 2009):

h₁: Member states with monist systems are more likely to make preliminary references to the CJEU than those with dualist systems.



On the other hand, other scholars instead endorse the idea that national courts in dualist systems are more likely to send preliminary references. In such contexts, litigants might be more likely to engage national courts in legal disputes over the applicability of EU law over national law and, as a consequence, will force judges to ask for references. The scarce experience of judges with international law and the direct applicability of EU law may encourage asking for a CJEU ruling to solve legal disputes and conflicts (Vink et al., 2009):

b₂: Member states with dualist systems are more likely to make preliminary references to the CJEU than those with monist systems.

3.2 Counter-limits to EU law

National constitutional and supreme courts in several Member States have established reservations to the supremacy doctrine – like in the *Solange* case¹ in Germany – and, by extension, also to EU law reception, in order to preserve the autonomy of their national constitutional and legal order (Martinico, 2012). These reservations have allowed higher courts to retain for themselves the right to review whether European Union institutions – mainly the CJEU – act within the competences conferred upon them and in respect of fundamental national constitutional norms (Albi, 2007). In such contexts, national courts will try to prevent the intervention of European institutions beyond their national limits and, in addition, to avoid the reversal of their decisions by higher courts when they apply EU law beyond its national limits. Hence,

b₃: National courts are less likely to make preliminary references when its highest national court has adopted the doctrine of counter-limits.

3.3 The role of higher courts within the multi-level judicial architecture

Following Article 267 TFEU and the CILFIT doctrine^{II}, higher (non-constitutional) courts, as last instance courts, have the obligation to call for preliminary references when they have serious doubts about the application of EU law. Hence, we should expect an increase in the amount of preliminary references as the number of higher courts grows (Hornuf and Voigt, 2012). Ramos Romeu (2006) and Kornhauser (1992a, 1992b) reinforce this argument by indicating how higher courts, as judicial bodies specialized on legal



interpretation, are more likely to receive and address complex EU law issues. So, they will request the intervention of the CJEU to solve complex doctrinal conflicts in case they cannot do it by themselves in applying the doctrine of *acte claire*. Moreover, Ramos identifies that references are costly and require a lot of time and effort from lower courts, which are not always equipped with the resources needed for this task. Otherwise, higher courts – due to more legal resources – are more willing to be involved in preliminary references. All together, that is: the obligation coming from Article 267 TFEU and CILFIT, the complexity of EU law cases addressed to higher courts, and the number of resources available for sending preliminary references, make higher courts more willing to cooperate with the CJEU than ordinary courts. As a result, we would expect more recourse to the use of preliminary references as the number of higher courts increases:

h₄: Member states with a larger number of higher courts are more likely to make preliminary references to the CJEU than states with less higher courts.

3.4 Judicial review of legislation powers

On the one hand, legalistic explanations argue that judges already entitled with judicial review power of legislation are more likely to send preliminary references (Alter, 1996, 1998; Stone and Brunell, 1998; Mattli and Slaughter, 1998; Carruba and Murrah, 2006). So, courts familiar with the power to preclude the application of national law will easily accept the chance to send preliminary references and declare national law null as a natural extension of their national pre-existing judicial powers. On the other hand, political accounts, assuming that ordinary judges are willing to increase their judicial power vis-à-vis other national institutions, emphasize the fact that national judges without the power of judicial review of legislation cooperate with the CJEU to legitimate the exercise of their newly conferred review powers against their national highest courts, like constitutional courts, who may try to circumvent their authority (Tridimas & Tridimas, 2004; Vink et al., 2009; Hornuf and Voigt, 2012). To test this intra-judicial competition argument, I offer a categorization that measures the extent of judicial review powers across higher courts as acknowledged by national rules: *No judicial review*, *decentralized judicial review* (all courts) and *centralized* (only the highest court). The classification mainly distinguishes judicial systems where only a higher court (such as constitutional courts) is entitled with the power of



judicial review from those in which this power is spread across the whole national judiciary. According to the intra-judicial competition theory, then:

h₅: National courts are more likely to send preliminary references in centralized judicial review systems than in judicial systems with decentralized or no judicial review powers.

3.5 Common Law

European countries with a common law tradition are attached to the general rule of binding precedent more than countries with other legal traditions (e.g. civil law, Scandinavian law, etc.). Judges socialized in this culture will be more aware of and used to the usage of CJEU precedents, and hence make less use of preliminary references. Similarly, Hornuf and Voigt (2012) state that judges in common law countries have themselves a more active role in the developing of law. That behaviour is extended to the application of EU law, where judges are more prone to solve EU legal conflicts and doubts without the intervention of the CJEU:

h₆: Member states with a common law tradition are less likely to make preliminary references to the CJEU than member states with a different legal tradition.

3.6 Support for the European Union

Burley and Mattli claim that judges are worried about public opinion on Europe and cannot deviate from their political preferences regarding the European Union (Burley and Mattli, 1993; Carrubba and Murrain, 2005). Traditionally, the literature measures this support for the EU using the percentage of citizens who think that membership of the EU is “a good thing” for their country, with data drawn from the Eurobarometer^{III}. The more public opinion is in favour of EU, the lower the costs for national courts of sending preliminary references to solve legal conflicts concerning the incorporation of EU law into the national legal system. Hence,

h₇: National courts are more likely to send preliminary references when the national political environment is favourable to European integration.



3.7 Government capacity for an effective and correct implementation of EU legislation

Wrong transposition by national implementing authorities will generate questions about the compatibility and doubts about the correct transposition/implementation of EU law into the national legal system. Litigants, looking for compliance of national authorities with EU law, rely on judicial institutions (such as the CJEU or national courts). National courts, as a last resort for citizens, will send preliminary references to solve potential interpretation and compatibility conflicts generated by low-quality implementation of EU legislation and obligations by their administration. When government and administration do not comply with their EU law obligations or incorrectly transpose EU legislation, national courts will request CJEU rulings to push governments towards full compliance with EU law. By contrast, the effective transposition and full compliance with EU law by the implementing political authorities reduces the odds of legal conflicts and, consequently, the number of preliminary references against the national authorities. Accordingly,

h₃: National courts will refer more often to the CJEU in countries with a lower quality of implementation.

4. Research Design: Data and method

This section describes the data sources, variables and statistical technique used to test the hypotheses presented above. The data set includes information on preliminary references^{IV} (dependent variable) and other legal and political factors (independent or explanatory variables) of EU Member States from 1961 until 2011. For the analysis I estimate a linear panel regression with random effects for the number of referrals sent to the CJEU by country. The selection of a random-effects model was determined by some variables for which within-cluster variation is minimal over time.

Next, I offer a description of the coding of the explanatory variables used in the analysis to test the hypotheses. Furthermore, I have included several “control variables” that are non-related to legal and political institutions but which, according to the literature, may affect the use of preliminary references, like *population* or *years of membership*.

- *Dualism* is a dummy variable that achieves the value of 1 if a Member State has a dualist legal system and 0 otherwise. Poland, the Czech Republic, the Slovak



Republic, Romania, Bulgaria, Slovenia, Estonia, Lithuania, Latvia, Cyprus, Belgium, France, Luxembourg, the Netherlands, Spain, Portugal, Greece and Austria were coded as monists, while Hungary, Italy, Germany, the UK, Ireland, Malta, Sweden, Finland, and Denmark were coded as dualists. The information on legal systems was gathered from Hoffmeister (2002) and Ott (2008).

- *Number of higher courts* measures the number of higher courts in a country. Constitutional courts are excluded from this categorization. Source: Association of the Councils of State or the Supreme administrative jurisdictions of the European Union.^v
- *Counter-limits to EU law*: The variable achieves the value of 1 if national constitutional courts, supreme courts or similar instances have established national doctrinal limits to the application of EU law, and 0 otherwise. The countries scoring 1 are **Italy** (based on the judgments of the Italian Constitutional Court in *Frontini* [Decision No. 183 (1973)], *Granital* [Decision No. 170 (1984)], and *Fragd* [Decision No. 168 (21.04.1989)]), **Germany** (Judgments of the German Constitutional Court (BVerfGE) in *Solange I* [BVerfGE 37, 271 (29.05.1974)], *Solange II* [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)], the *Brunner case* in Maastricht [BVerfGE 89 (12.10.1993)] and *Lisbon Treaty* [BVerfGE, 2 BvE 2/08 (30.6.2009)]), **Belgium** (Cour d'arbitrage's judgment No. 12/94, *Ecoles Europeenes* (01.02.1994)), **France** (Conseil Constitutionnel in *Maastricht* (02.09.1992), in *Amsterdam* (31.12.1997) and in the *Constitutional Treaty* [Décision No. 2004-505 DC (19.11.2004)]), the **UK** (House of Lords *Factortame* judgments: 1st judgment [Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others (18.05.1989)] and 2nd judgment (11.10.1990)), **Denmark** (Danish Supreme Court of the Maastricht Treaty in *Carlsen v. Rasmussen* case (06.04.1998)), **Greece** (Greek Council of State decision in *Bagias v. DI KATSA* [Decision No. 2808/1997]), **Spain** (Judgment of the Spanish Constitutional Court in Maastricht [Decision n° 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004]), **Poland** (Polish Constitutional Court judgments on the Polish Accession Treaty [Case K 18/4 (11.05.2005)], and on the European Arrest Warrant [Case P 1/05 (27.04.2005)]), the **Czech Republic** (Czech Constitutional Court's Post-Accession Decision [Pl. ÚS 50/04 (08.03.2006)] and the Decision on the ratification of the



Lisbon Treaty [Pl. ÚS 29/09 (03.11.2009)], and **Cyprus** (Cyprus Supreme Court (Ανώτατο Δικαστήριο Κύπρου) Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest Warrant Law).

- *Common law*: This variable assumes the value of 1 in countries with elements of the common law tradition (UK, Cyprus and Malta), and 0 otherwise. Also countries resulting in part from the civil law and the common law tradition, such as Ireland and Scotland, are considered.
- *Type of judicial review of legislation*: These variables code the kind of courts that can review the constitutionality of laws within a country. I have created three variables distinguishing a) countries with no judicial review, b) countries where ordinary courts are empowered with judicial review, also named as *decentralized*, and c) countries where judicial review is exercised only by constitutional courts and hence *concentrated*. The information for old members was collected from Vink et al. (2009), while the values for CEE countries were gathered from the Comparative Constitutional Analysis Project.^{VI}
- *Recent EU membership*: This variable achieves the value of 1 if the country accessed the European Union during either the 2004 or the 2007 enlargement, and 0 if otherwise.
- *Support for the European Union*: This variable measures the support of Member States' citizens for the European Union. The percentages are taken from the Eurobarometer,^{VII} considering the question of whether citizens think that membership of the EU is “a “good thing.
- *Government capacity*: This variable corresponds to an index from the Democracy Barometer^{VIII} created by Kriesi and Bochsler (2012) as a combination of indicators that measure the conditions for efficient implementation: 1) a public service independent from political interference, 2) bureaucratic quality and effective implementation of government decisions, and 3) absence of corruption and the willingness for transparent communication. According to the main hypothesis national courts will refer more often to the CJEU when national governments do not fulfil their European demands because of poor governmental capacity. Values for Latvia were not available.

*Control variables*

- *Population*: Member states with a large population should tend to litigate more and, as a result, will send more preliminary references (Stone and Brunell, 1998). The variable was transformed to its logged value. Source: Eurostat, accessed August 2012.
- *Years of membership* measures the duration of EU membership of a country. This variable is used as a proxy for the experience of national courts with EU legal instruments and their acquaintance with PR proceedings. More experience makes it more likely that a court will send preliminary references to the CJEU (Ramos, 2006).

Table 1 lists some of the descriptives for the variables detailed above.

Table 1: Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
Preliminary references	647	11.477	14.647	0	83
Dualism	647	.415	.493	0	1
Counter limits to EU law	647	.295	.456	0	1
Number of higher courts	647	1.956	1.065	0	5
Judicial review: no judicial review	647	.217	.413	0	1
Judicial review: decentralized	647	.233	.423	0	1
Judicial review: centralized	647	.548	.498	0	1
Support for the European Union	575	56.82	14.665	20	88
Government Capacity	639	64.648	19.586	23.4	97.2
Common law	647	.145	.352	0	1
Population	647	16.218	1.525	12.6	18.2
Years of membership	647	18.077	14.165	0	50
Recent EU membership (CEE)	647	.139	.346	0	1

5. Empirical Findings

Table 2 reports the results of the models estimated for the hypotheses on the use of preliminary references. To test the validity of the explanations presented I make use of five different models. While the first two models estimate the effect of the variables for all Member States (EU-27), specifications 3, 4 and 5 assess the impact of similar variables for two separate groups: old (3 and 4) and new (5) Member States. To clarify: model 4 has been included to be compared with model 3 and see whether the effect of the independent variables in old Member States is robust and constant since the accession of CEE countries to the EU in 2004.



Table 2: Time series cross-sectional linear regression

	1	2	3	4	5
Variables	<i>EU-27 1961-2011</i>	<i>EU-27 1973-2011 Full model</i>	<i>Old MS 1973-2011</i>	<i>Old MS - 2004-2011</i>	<i>New MS 2004-2011</i>
Dualism	2.657 [1.843]	0.752 [3.627]	4.665 [4.581]	4.758 [4.179]	2.442** [1.057]
Counter limits to EU law	1.540 [3.444]	-3.099 [3.219]	-3.359 [3.759]	-2.263 [2.929]	-1.201 [1.271]
Number of higher courts	2.429** [1.056]	4.037** [1.594]	5.593*** [0.638]	7.363*** [1.036]	-0.498 [0.362]
Judicial review category of reference	No judicial review	No judicial review	No judicial review	No judicial review	Centralized
Judicial Review: Decentralized (all courts)	-1.395 [2.670]	-0.342 [3.420]	-4.570* [2.767]	-1.587 [4.141]	5.786*** [2.191]
Judicial Review: Centralized (only higher courts)	4.057 [3.511]	7.174** [3.512]	7.477* [4.272]	7.677* [4.335]	
Common law	-1.093 [2.268]	0.857 [3.374]	0.115 [2.460]	-2.696 [1.947]	5.400*** [2.027]
Population	1.992** [0.803]	3.301*** [1.157]	3.094* [1.684]	5.185*** [1.235]	2.176*** [0.593]
Year of membership	0.530*** [0.150]	0.477*** [0.145]	0.476*** [0.153]	0.617*** [0.156]	0.636** [0.251]
New member states (CEE)	1.847 [4.657]	4.274 [5.818]			
Support for the European Union		-0.079 [0.070]	-0.082 [0.078]	-0.115 [0.082]	-0.103* [0.061]
Government capacity		0.133 [0.122]	0.115 [0.112]	0.142 [0.097]	-0.266*** [0.100]
Constant	-38.243** [15.121]	-65.742** [30.366]	-64.423** [32.603]	-109.191*** [24.587]	-17.768 [11.889]
Observations	647	567	485	120	82
Number of countries	27	26	15	15	11
R2 within	0.4033	0.2439	0.2449	0.1559	0.238
R2 between	0.7081	0.8048	0.8987	0.9217	0.8896
R2 overall	0.6028	0.6701	0.6876	0.833	0.4877
Wald test	0.000***	0.000***	0.000***	0.000***	0.000***
Robust standard errors in brackets	* significant at 10%; ** significant at 5%; *** significant at 1%				

As regards the results for the EU-27 (see models 1 and 2), and taking as a reference the full model 2, the impact of *the number of higher courts* across years and countries is remarkable. The coefficients for this variable are significant at 5%, meaning that EU Member States refer 4.037 more preliminary rulings to the CJEU if the number of higher courts increases by one unit across time and/or between countries. This finding emphasizes the relevance of the engagement of higher courts within the preliminary reference procedure.^{IX}

A second interesting finding for all 27 Member States (still model 2) is related to the type of judicial review of legislation. Looking at the dummy variable “Judicial review: centralized”, which tests whether national courts are constrained by constitutional courts or similar send more rulings than countries where judicial review is not allowed (the base category), one can see how national courts refer 7.174 more rulings to the CJEU in a



centralized system than in other situations to increase their judicial power vis-à-vis higher courts. As I have indicated above, national judges will try to legitimate the exercise of their newly conferred review powers by playing the CJEU against the national highest courts.

A third and more interesting effect is shown by the CEE or new Member States variable in model 2. This variable was included to control for the effect of these new members as a group. This strategy helps us to identify the persistence of additional omitted variables affecting the relationship between older and newer MS. However, the results indicate that there are no other hidden factors accounting for the variance in our dependent variable.

Once some common dynamics in the application of EU law are identified, I have estimated models 3, 4 and 5 to account for any dissimilar institutional effects among old and new Member States through the analysis of the variation in the use of preliminary reference within groups. In the case of EU-15 countries (see models 3 and 4 for old MS), I stress the impact of two institutional factors: *number of higher courts* and *judicial review powers*. As we can see, the *number of higher courts* has a positive and stronger effect on the number of preliminary references compared to the full model for the EU-27. Furthermore, the analysis suggests how, as for the full models, judges under centralized system are more likely to send preliminary references to legitimate the use of judicial review powers vis-à-vis higher courts. In addition, the findings also show that countries where national courts are already empowered with review power by their national rules are less likely to send preliminary references than those countries with no judicial review. Likewise, model 4 for the EU-15 since 2004 confirms the impact of the same variables.

Even more interesting are the findings in model 5, showing substantial differences in the kind of variables affecting the variation in the use of preliminary references across the new Member States. Firstly, we can appreciate how *dualist* CEE countries send more preliminary references than new *monist* members, while in the case of old member states there is no effect by this variable. This makes us wonder to what extent these differences between monist and dualist systems are diluted as EU legislation, rules and traditions take root within a national legal orders over time, as has happened for the EU-15.

Moreover, contrary to what happens in EU-15, we observe how new Members States with decentralized judicial review (e.g. Estonia) send more preliminary references than CEE countries with no power to review legal acts. This finding points to the relevance of



pre-existing judicial review powers among recent EU members so that judges embrace the duty of sending preliminary references.

Furthermore, we see how government capacity impacts significantly on the number of preliminary references within CEE countries: to have a government with a high transposition capacity has a negative effect on the use of preliminary references. Contrariwise, national courts are more likely to send preliminary references in countries with low government capacity, i.e. states in which the problems of wrong implementation of EU legislation are more likely to occur, such as Romania and Bulgaria (Falkner and Treib, 2008; Trauner, 2009). This finding points out that courts not only ask for CJEU rulings with the intention to solve doubts about the application of EU law, but also to force government and administration to fully enforce their European obligations.

As regards other factors, the results show a strong and constant effect by the control variables throughout all models: the rate of preliminary references will be higher in member states with a larger *population* and more *years of membership*. Nevertheless, we can observe how the establishment of counter-limits by higher courts to preserve the autonomy of their national constitutional and legal order has no effect on the likelihood of using preliminary references. Finally, and finishing with new member states, the decreasing effect of *support for the European Union* (at 10% of significance) and, unlike expected, the positive impact of *common law* systems on the use of preliminary references must be emphasized.

6. Conclusions

In this article I have analysed the use of preliminary references in the EU-27 with the main aim of explaining institutional differences and similarities between old and new Member States leading to the activation of Article 267 TFEU by national judges. The results of the analysis do not reveal any common institutional dynamic influencing the behaviour of courts in their recourse to preliminary references. However, they suggest some differences in the judicial and political institutional dynamics driving the use of preliminary references within new and old Member States. While in the case of the EU-15 the use of preliminary references seems mainly to be influenced by the role played by higher courts and the inter-judicial competition between lower and higher courts, in CEE



countries the main factors explaining the use of preliminary references are the dualist tradition of some countries, the previous experience of national courts with judicial review powers, and the incapacity of governments and administrations to successfully implement EU policies and legislation.

The findings of this article offer preliminary evidence on the similarities and differences between new and old Member States as regards the use of preliminary references. While the data on preliminary references suggests an increasing trend in the use of (annual) preliminary in CEE countries, this work also advocates the existence of some specific factors explaining the request of CJEU rulings on the other side of the “iron legal curtain”. Some of the factors in new Member States seem to be related to the recent integration of EU principles and norms within national legal orders and the adaptation capacity of political institutions to comply with EU legislation. Nevertheless, we can expect a reduction of the impact of dualism on the use of preliminary references as courts becomes more familiar with the application of EU law, as it has also happened in the EU-15. In addition, it has become quite clear that national courts are just as, if not more, important in newer Member States than in older ones in terms of policy-making, not least because of their relevance for improving the quality and correct judicial enforcement of EU law when national governments fail to correctly implement EU legislation at domestic level.

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^I Judgment of the German Constitutional Court - *Solange I*. BVerfGE 37, 271 (29.05.1974).

^{II} C-283/81 CILFIT v. Ministero della Sanità [1982].

^{III} http://ec.europa.eu/public_opinion/index_en.htm.

^{IV} The data on preliminary references was gathered from the official statistics on the judicial activity of the Court of Justice of the European Union: http://curia.europa.eu/jcms/jcms/Jo2_7032/.

^V http://www.juradmin.eu/en/home_en.html.

^{VI} <http://www.concourts.net/>.

^{VII} http://ec.europa.eu/public_opinion/index_en.htm.

^{VIII} <http://www.democracybarometer.org/>.

^{IX} The same models have also been estimated using a linear regression clustered by countries with similar results.

References

- Albi Anneli, 2007, ‘Supremacy of EC Law in the New Member States Bringing Parliament into the Equation of Co-operative Constitutionalism’, in *European Constitutional Law Review*, III(1): 25-67.
- Alter Karen J., 1996, ‘The European Court’s Political Power’, in *West European Politics*, XIX(3): 458-87.
- Alter Karen J., 1998, ‘Explaining National Court Acceptance of European Jurisprudence: A Critical



Evaluation of Theories of Legal Integration', in Slaughter Anne-Marie, Stone Sweet Alec and Weiler J.H.H. (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context*, Hart Publishing, Oxford.

- Alter Karen J. 2001, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford and New York.
- Burley Anne-Marie and Mattli Walter, 1993, 'Europe Before the Court: A Political Theory of Legal Integration', in *International Organization*, XLVII(1): 41-76.
- Carrubba Clifford J. and Murrah Lacey, 2005, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union', in *International Organization*, LIX(2): 399-418
- Falkner Gerda and Treib Oliver, 2008, 'Three worlds of compliance or four? The EU-15 compared to new member states', in *Journal of Common Market Studies*, XLVI(2): 293-303.
- Hoffmeister Frank, 2002, 'International Agreements in the Legal Order of the Candidate Countries', in Ott Andrea and Inglis Kirstyn (eds), *Handbook on European Enlargement*, T.M.C. Asser Press, The Hague.
- Hornuf Lars and Voigt Stefan, 2012, 'Preliminary References – Analyzing the Determinants that Made the ECJ the Powerful Court it Is', CESifo Working Paper Series, No. 3769, CESifo Group Munich.
- Kornhauser Lewis A., 1992a, 'Modeling Collegial Courts I: Path-dependence', in *International Review of Law and Economics*, XII(2): 169-85.
- Kornhauser Lewis A., 1992b, 'Modeling Collegial Courts II: Legal Doctrine', in *Journal of Law, Economics, & Organization*, VIII(3): 441-70.
- Kriesi Hanspeter and Bochsler Daniel, 2012, *Varieties of Democracy*. NCCR. www.democracybarometer.org/Papers/Bochsler_Kriesi_2012.pdf.
- Kühn Zdenek, 2006, 'The Judicialization of European Politics', in Heywood Paul M., Jones Erik, Rhodes Martin and Sedelmeier Ulrich, *Developments in European Politics*, Palgrave Macmillan, Basingstoke and New York, 216-36.
- Martinico Giuseppe, 2012, 'Is the European Convention going to Be "Supreme"? a Comparative Constitutional Overview of ECHR and EU Law before National Courts', in *European Journal of International Law*, XXIII(2): 401-24.
- Mattli Walter and Slaughter Anne-Marie, 1998, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints', in Slaughter Anne-Marie, Stone Sweet Alec and Weiler J.H.H. (eds), *The European Courts and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford.
- Ott Andrea, 2008, 'Multilevel Regulations Reviewed by Multilevel Jurisdictions: The ECJ, the National Courts and the ECtHR', in Follesdal Andreas, Wessel Ramses A. and Wouters Jan (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Martinus Nijhoff Publishers, Leiden.
- Ramos Romeu Francisco, 2006, 'Law and Politics in the Application of EC Law: Spanish Courts and the CJEU 1986-2000', in *Common Market Law Review*, XLIII(2): 395-421.
- Sadurski Wojciech, 2008, 'Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European Union', in *European Law Journal*, XIV(1): 1-35.
- Stone Sweet Alec and Brunell Thomas L., 1998, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95', in *Journal of European Public Policy*, V(1): 66-97.
- Trauner Florian, 2009, 'Post-accession compliance with EU law in Bulgaria and Romania: a comparative perspective', in Schimmelfennig Frank and Trauner Florian (eds), special issue *Post-accession compliance in the EU's new member states*, European Integration online Papers, XIII(2), Art. 21. <http://eiop.or.at/eiop/texte/2009-021a.htm>.
- Tridimas Georges and Tridimas Takis, 2004, 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure', in *International Review of Law and Economics*, XXIV(2): 125-45.
- Vink Maarten, Claes Monica and Arnold Christine, 2009, 'Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis'. Paper presented at the 11th Biennial Conference of the European Studies Association.
- Wind Marlene, 2010, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review', in *Journal of Common Market Studies*, XLVIII(4): 1039-63.
- Wind Marlene, Martinsen Dorte S. and Pons Rotger Gabriel, 2009, 'The Uneven Legal Push for Europe: Questioning Variation when National Courts go to Europe', in *European Union Politics*, X(1): 63-88.